

DEC 21 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDY LARANCE SMITH,

Petitioner–Appellant,

v.

ERNIE ROE, Warden,

Respondent–Appellee

No. 04-17465

D.C. No. CV-98-01312-EJG/PAN

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted October 18, 2005
San Francisco, California

Before: **KOZINSKI** and **FERNANDEZ**, Circuit Judges, and **HATTER**,
Senior District Judge**.

Unlike subsequent versions of California Penal Code § 290, which describe the registration obligations of transients, *see, e.g.*, Cal. Penal Code § 290(a)(C)(i) (2005), at the time of Smith’s alleged offense in 1996, a homeless person’s

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Terry J. Hatter, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

registration obligations were unclear. *See* Cal. Penal Code §§ 290(a), (f) (1996).

The state failed to introduce sufficient evidence to support a finding that Smith knowingly failed to register under the statute. “[A]ctual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.” *Lambert v. California*, 355 U.S. 225, 229, 78 S. Ct. 240, 243, 2 L. Ed. 2d 228, 232 (1957).

Therefore, Smith’s conviction cannot stand.

“Because a defendant may not be retried under the Double Jeopardy Clause if the evidence against him is insufficient to support a conviction,” (*United States v. Messer*, 197 F.3d 330, 341 (9th Cir. 1999); *see also Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92, 61 L. Ed. 2d 560, 566-67 (1979)), the district court must issue the writ of *habeas corpus*. Although Smith has requested a new trial, because his conviction is insufficient as a matter of law under *Jackson*, he may not be retried.

REVERSED and **REMANDED** for issuance of the writ in accordance with this memorandum disposition.